

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CHRISTIAN G.,

Claimant,

vs.

FAR NORTHERN REGIONAL CENTER,

Service Agency.

OAH No. 2010100666

DECISION

This matter was heard before Administrative Law Judge Susan H. Hollingshead, State of California, Office of Administrative Hearings (OAH), in Chico, California, on July 11, 12, 13, 14, 15, 28 and 29, 2011.

Phyllis J. Raudman, Attorney at Law, represented the service agency, Far Northern Regional Center (FNRC).

Lina Foltz, Attorney at Law, represented claimant. Claimant's parents were present throughout the hearing.

Oral and documentary evidence was received. Submission of this matter was deferred pending receipt of Closing Briefs. Service Agency's Closing Brief and Claimant's Closing Brief were submitted on August 17, 2011, and marked respectively as Exhibits 18 (RC 43) and KKK (CB 127). Service Agency's Reply to Consumer's Closing Brief, and Claimant's Reply to Closing Brief by Far Northern Regional Center with Claimant's Objection and Motion to Strike Rebuttal Declaration Statements Submitted by Far Northern Regional Center were received on August 24, 2011, and marked respectively as Exhibits 19 (RC 44) and LLL (CB128).

A telephonic status conference was held on September 1, 2011, at which time claimant's Motion to Strike was addressed and it was determined that the parties would be allowed to submit final responses with supporting declarations. Service Agency's Response to Consumer's Reply to Closing Brief was submitted on September 9, 2011, and marked as Exhibit 20 (RC 45). Claimant's Response and Objection to Reply by Far Northern Regional Center was submitted on September 14, 2011 and marked as Exhibit MMM (CB129).

The record was closed and the matter submitted for decision on September 15, 2011.

ISSUES

1. Is claimant entitled to reimbursement for CPI (Crisis Prevention Institute) services provided in October 2009? If so, is he entitled to aid paid pending from July 17, 2009, to present?
2. Is FNRC required to fund a family health club membership for claimant and his family? If so, is claimant entitled to aid paid pending from March 25, 2009, to present?
3. Is FNRC required to fund the cost of round trip transportation to and from Paradise to claimant's part-time job in Chico?
4. Is FNRC required to fund reimbursement of travel expenses to and from school, up to thirty-two miles per day? If so, is claimant entitled to aid paid pending from March 25, 2009, to present?
5. Is FNRC required to fund transportation and travel expenses, and registration fees for up to five persons to attend the annual DAN (Defeat Autism Now) conference?¹ If so, is claimant entitled to aid paid pending from March 25, 2009, to present?
6. Is FNRC required to fund transportation and travel expenses from Paradise to Reno, Nevada, up to twelve times per year to see Dr. Meier? If so, is claimant entitled to aid paid pending from July 17, 2009, to present?
7. Is FNRC required to fund legal services for an educational attorney? If so, is claimant entitled to aid paid pending from the date of the last agreed upon IPP to present?
8. Is claimant entitled to 629 hours per month of aid paid pending for his "parent-vendored home program" (Project Christian) from July 17, 2009, or is FNRC prohibited from funding beyond 173 hours per month pursuant to enactment of Welfare and Institutions Code section 4686.2?

¹ DAN has been renamed ARI, Autism Research Institute.

FACTUAL FINDINGS

1. Claimant is an eighteen-year-old young man who qualifies for regional center services based on a diagnosis of autism and mild mental retardation. He became eligible for FNRC services in July 1995. Claimant was born on June 11, 1993, and reached the age of majority during the pendency of this hearing. He has been receiving services from FNRC pursuant to the Lanterman Developmental Disabilities Services Act (Welfare and Institutions Code Section 4500 et seq.)²

Procedural History

2. The parties have a protracted history of disagreements regarding FNRC funding of services for claimant. Of specific concern to the present matter are actions that have occurred during the approximately three-year period preceding this hearing. Numerous requests were made for service funding during that time. FNRC has funded services, denied services, and existing services have been terminated, suspended or modified. These actions have resulted in multiple Notices of Proposed Action (NOPA) and related Fair Hearing Requests. Some requests have proceeded to Fair Hearing, with final decisions rendered, and others have been dismissed or dismissed without prejudice and refiled at a later date. Actions have also been filed in the Butte County Superior Court.

3. Numerous Fair Hearing Requests were consolidated for hearing before Administrative Law Judge Stephen J. Smith originally scheduled for March 9, 2009. Claimants requested withdrawal and dismissal of all pending requests and Judge Smith issued the following “Order Following Fourth Status Conference, Order for IPP Meeting and Order for Dismissal Upon Stipulated Withdrawal” on March 13, 2009:

IPP Meeting: Counsel for the Regional Center moved on March 10, 2009, for an Order to convene an IPP meeting as soon as possible to review claimant’s program, supports and services based upon Dr. Siegal’s assessments. Counsel for claimant did not oppose the motion and the parties noted the meeting has been scheduled for March 25, 2009 at the Regional Center.

Stipulated Withdrawal and Dismissal of Fair Hearing Requests: Counsel for claimant advised her clients have authorized her to withdraw the several Requests for Fair Hearing enumerated above now pending. Counsel acknowledged the withdrawals will result in dismissal of all the now pending Requests for Fair Hearing.

² All subsequent statutory references are to the Welfare and Institutions Code, unless otherwise specified.

THEREFORE, GOOD CAUSE APPEARING, the Motion to Compel an Individual Program Plan Meeting for claimant is GRANTED. The IPP meeting shall take place on March 25, 2009, at the Regional Center, unless good cause requires scheduling an additional of [sic] different date and time.

The now pending Requests For Fair Hearing, as enumerated in the Caption above, and all of them, are WITHDRAWN AND DISMISSED.

4. The IPP (Individual Program Plan) meeting ordered by Judge Smith convened on March 25, 2009.

5. During March, April, and May 2009, numerous NOPAs were issued and Requests for Fair Hearing filed.

6. In June 2009, approximately four Requests for Fair Hearing with seventeen issues were consolidated for hearing. Administrative Law Judge Judith A. Kopec heard these matters and her decision issued on July 17, 2009 (Kopec Decision). Judge Kopec's findings and decisions related to four issues in the present matter:

Issue One: CPI Training.
Issue Six: Transportation and Travel Expenses to Dr. Meier in Reno.
Issue Seven: Funding for an Educational Attorney.
Issue Eight: Aid Paid Pending for Home Program.

7. Effective July 28, 2009, Assembly Bill 9 (A.B. 9, Chapter 9, Statutes 2009), also known as the "trailer bill," amended sections of, and added new sections to the Lanterman Act. Because it "addresses the fiscal emergency declared by the Governor by proclamation of July 1, 2009," the act was declared an urgency statute and took effect immediately. Mandated changes were retroactive to July 1, 2009, or August 1, 2009, for consumers with existing services.

8. On August 5, 2009, FNRC sought reconsideration of Judge Kopec's July 17, 2009, decision based on the subsequent statutory amendments to the Lanterman Act.

9. By letter dated October 20, 2009, FNRC informed claimant that certain services would be suspended, terminated or modified pursuant to the statutory amendments to the Lanterman Act enacted under Assembly Bill 9 (AB 9). The letter explained that the budget reductions and subsequent changes to the Lanterman Act, a copy of which was attached, prohibited the regional center from paying for some services. The letter also explained "if you disagree with our decision that found you not eligible for an exception, you may file an appeal by completing the attached Fair Hearing Request form" and "if you have any questions, please feel free to call your Service Coordinator." Claimant's "services that were affected by these changes," as relevant to the present matter, were set forth as follows:

The following services are being SUSPENDED effective 30 days from receipt of this notice:

Vendor Name: Fit One Paradise Service Type: Gym
Membership

The following services are being TERMINATED effective 30 days from receipt of this notice:

Vendor Name: [Parents] Service Type: Travel
Reimbursement

Reason for Action:

Legislative changes to the Lanterman Act prohibit Far Northern Regional Center from funding these services, except in extraordinary circumstances. Far Northern has reviewed your case and determined that you do not meet the criteria for an exception.

Authority for Action:

California Welfare and Institutions Code Section 4648.5 (attached)

California Welfare and Institutions Code Section 4648.35
(attached)

California Welfare and Institutions Code Section 4686.5 (attached)

The following services are being MODIFIED to come into compliance with the Lanterman Act effective 30 days from receipt of this notice:

Vendor Name [Parents] Service Type: In Home
Behavior Program

Reason for Action:

Legislative changes to the Lanterman Act limit the number of hours per week for a behavior program, and requires parental participation without parental payment.

Authority for Action:

California Welfare and Institutions Code Section 4686.2 (attached)

10. On October 28, 2009, claimant filed Fair Hearing Requests disputing the change in services noted in the October 20, 2009 letter, as well as additional issues. The reasons for the fair hearing requests included the following:

Modification of [claimant's] in home/community program
Describe what is needed to resolve your complaint:
40 hrs. per week of ABA program
24 hrs. per day – 7 days per week of personal attendant care (with aid paid pending)

Denial of gym membership

Termination of travel reimbursement to Dr. Meier as ordered by ALJ Judith Kopec on July 17, '09...

Describe what is needed to resolve your complaint:
Continuation of gym membership
Reinstatement of travel reimbursement to Dr. Meier as ordered (w/ aid paid pending)

11. On November 23, 2009, FNRC issued a NOPA denying “funding of Crisis Management Training provided by Crisis Prevention Institute, Inc. and/or Staff Resources and staff wages for attendance of [sic] training conducted on 10/15-10/16/09.” The reason for the action was, “FNRC did not authorize the service to be provided by Crisis Prevention Institute, Inc. FNRC has offered and provided required Crisis Management Training through Professional Crisis Management. Congruent with Welfare and Institutions Code 4646(a), FNRC has determined that the purchase of services from Professional Crisis Management is most cost effective.”

12. On November 26, 2009, claimant filed a Fair Hearing Request appealing FNRC's “denial of funding crisis training for C.P.I. & [claimant's] personal attendants and family.” To resolve the complaint, claimant asked for FNRC to “fund training and wages,” with aid paid pending.

13. On December 7, 2009, Judge Kopec issued an order denying reconsideration of her July 17, 2009, decision stating:

The Lanterman Act provides that the decision rendered after a fair hearing is the final administrative decision. There is no provision for reconsideration of the decision under the Lanterman Act.

FNRC did not appeal Judge Kopec's decision. FNRC was not disputing the decision rendered but was seeking assistance in implementing the decision in light of the subsequent AB9 mandates.

14. On March 25, 2010, claimant dismissed all the pending Fair Hearing Requests without prejudice.

15. On July 16, 2010, claimant filed a Complaint in the Butte County Superior Court containing multiple causes of action including a request to enforce the Kopec Decision. A Petition for Writ of Mandate, Prohibition, or Other Extraordinary Relief was subsequently filed in this matter and heard on February 23, 2011.

16. On October 4, 2010, FNRC issued thirteen NOPAs that are the subject of the present matter. Claimant filed Fair Hearing Requests as to those issues on October 15, 2010. The hearing originally scheduled for February 2011, was continued to June 2011.

17. On March 22, 2011, Butte County Superior Court Judge Sandra L. McLean issued her Order on Petition of Mandate, Prohibition, or Other Extraordinary Relief. This Order addressed requests made pursuant to the Kopec Decision that are relevant to the present matter as follows:

Issue One: CPI Training

Item 1 of [Judge Kopec's] ORDER states that "Regional center shall fund training services for claimant's family members who provide direct care to him and his home program service providers in effective and appropriate methods to respond to the specified types of aggressive behaviors that claimant exhibits."

As to this item, the Petition is denied.

Issue Six: Transportation and travel expenses to Dr. Meier in Reno

Item 2 of said ORDER states that "Regional center shall fund travel expenses for appointments with Dr. Meier as included in the last agreed-upon IPP that authorizes such travel."

As to this item, the Petition is granted, with Respondent to fund such expenses from the date of said IPP through the Fair Hearing Requests of October 28, 2009, if they have not already done so. Any other orders or determinations with regard to said item are to be made in the Fair Hearing process.

Issue Eight: Aid paid pending for home program.

Item 4 of said ORDER states that "Regional center shall provide or obtain the appropriate service code, or other mechanism, that is necessary to continue to fund claimant's home program and its required services."

As to this item, the Court reserves jurisdiction pending the determination described in 3 above.³

Judge McLean also ordered “with regard to Petitioner’s request for ‘aid paid pending,’ Respondent is ordered to provide aid paid pending from the date of said ORDER through October 28, 2009, if they have not already done so. Any other orders or determinations with regard to such requests are to be made in the Fair Hearing process. Any issues with regard to the requested relief in the Petition, other than those identified above, are to be addressed in the Fair Hearing process. Any issues subsequent to this order, other than those identified above, are to be addressed in the Fair Hearing process. The Petitioners will fully cooperate with Respondent in regard to the above.”

18. A Prehearing Conference was held before Administrative Law Judge Jonathan Lew on June 9, 2011. Thirteen issues were identified in the above-reference NOPAs issued by FNRC on October 4, 2010. Judge Lew ordered that six of these issues shall be bifurcated for separate hearing after a new assessment of claimant is performed. The remaining issues are set forth above with the addition of the question of entitlement to aid paid pending for 629 hours of claimant’s home program.

19. At hearing the parties reached agreement regarding the terms of the independent assessment of claimant that will be performed prior to the hearing on the remaining bifurcated issues.

Crisis Prevention Institute (CPI) Services

20. The Kopec Decision specifically addressed the following issue related to CPI services:

Is regional center required to fund training services for the management of assaultive behavior for family and staff through Crisis Prevention Institute, or alternative training for parents to address claimant’s assaultive behavior in the home?

21. Judge Kopec determined that “claimant has established that his family and service providers require training in responding to his assaultive behavior ... However, claimant has not established that training from CPI is appropriate to serve his needs.” She then concluded that the “regional center is required to fund training pertaining to the management of assaultive behavior for claimant’s family members who provide direct care to him and his home program service providers, including his tutors, concerning methods of responding to the specific types of aggressive behaviors he exhibits. But regional center is not required to provide the training through CPI.”

³ Item 3, noting “ambiguity in this item in the ORDER”, remanded to FNRC “to make a determination in regard to the number of hours of any behavioral care as opposed to any day care for the time period from the date of the ORDER through October 28, 2009.”

22. The order was as follows:

Regional center shall fund training services for claimant's family members who provide direct care to him and his home program service providers in effective and appropriate methods to respond to the specific types of aggressive behaviors that claimant exhibits.

23. The parties have been in disagreement as to the provider of the required crisis management services. There was extensive testimony and documentary evidence concerning this issue. FNRC takes the position that it arranged for training from PCM (Professional Crisis Management) and provided suggestions for managing any crisis situations that might occur prior to the training. Claimant's parents contend that they were concerned that claimant's behaviors were escalating and that they needed the training before the dates given for PCM training. As a result they pursued crisis management training on their own, arranged and completed training with CPI, and are seeking to have that training reimbursed.

24. By letter dated September 11, 2009, Linda Carpenter, FNRC Chief Counsel, informed parents that the regional center "has arranged to have staff from *Professional Crisis Management (PCM)* provide training for you and [claimant's] home care providers in connection with management of his assaultive and aggressive behavior and crisis management interventions." The letter stated that the training would take place in Chico on November 5 or 6, 2009, based on the parents' election, and requested response. Ms. Carpenter also requested a description of the "types of behaviors and concerns you have related to safely meeting [claimant's] home program care needs."

25. Ms. Carpenter testified that, having received no response from the parents, she followed up by letter dated October 1, 2009. On that same date she referenced staff recommendations for additional resources: Crisis Mobile Team, temporary placement for stabilization in a crisis home, or contacting 911 "if the safety of your son, you or anyone else is in danger."

26. Ms. Carpenter also testified that, at parents' recommendation, she contacted Staff Resources, Inc. to inquire about their crisis management training options and was informed that such service would not be available until approximately October 30, 2009.

27. The parents testified that they did respond to Ms. Carpenter by letter dated September 17, 2009. That letter also informed FNRC that parents were concerned with claimant's escalating behaviors.

28. The parents contend that they notified FNRC on several occasions that they, and various caregivers, were concerned with claimant's behaviors. They also introduced a DVD showing two interactions with claimant's parents. One scene showed a September 10, 2009, altercation between claimant and his father that was being recorded by his mother, and the other showed the interactions between claimant and his mother after an October 12, 2009, incident.

Several witnesses testified that they were aware of these incidents because they had been told by others, rather than personally witnessing events. Evidence further established that claimant's behaviors were not as disruptive at school as they were reported to be in the home.

29. Claimant's parents arranged for and participated in training through CPI on October 15 and 16, 2009, without FNRC authorization. They contend that prior authorization was not required as FNRC is authorized to fund services on an emergency basis. They sought reimbursement and FNRC denied the request in the November 23, 2009, NOPA that resulted in claimant's Fair Hearing Request of November 26, 2009.

30. Claimant dismissed his request for fair hearing in this matter on March 25, 2010, and re-filed a request on this issue on October 15, 2010.

31. FNRC contends that claimant waived his right to appeal because this same issue was part of a Fair Hearing Request dated November 26, 2009, that was dismissed by claimant on March 25, 2010. In addition, the same issue was considered by Judge McLean and was denied on March 22, 2011.

Claimant's right to this service is based on the Kopec Decision not the Fair Hearing Request. Judge Mclean denied the claim for reimbursement of CPI services, not the right to crisis management training as ordered by the Kopec Decision.

32. Although CPI might be the family's preferred provider, no persuasive evidence was presented that PCM is not an appropriate crisis management services provider. Nor was evidence presented to show that CPI training itself was not appropriate though not the chosen provider by FNRC.

33. Claimant is entitled to provision of crisis management training services. None of the evidence considered established that he is entitled to reimbursement for the training provided, without FNRC authorization, by CPI. Because there was no argument made that the training provided by CPI was inappropriate to meet claimant's needs, FNRC may meet its obligation to fund crisis management services by reimbursing claimant in an amount equal to the total cost to FNRC of providing this training through PCM, which parents may chose to use to offset their obligation for the CPI training costs. FNRC's obligation to fund this service would then be fulfilled.

34. "Aid paid pending" is the term used to refer to the mandate in Section 4715 that a claimant is entitled to continued provision of services during the appeal process if he or she files a timely request for hearing, that is within ten days of notice of a proposed action. Aid paid pending does not apply to this issue because the service is required to be provided pursuant to the Kopec Decision.

Family Health Club Membership

35. Claimant has had access to a health club membership funded by FNRC. At the IPP meeting held on March 25, 2009, pursuant to Judge Smith's Order, Objective 2 noted that "[Claimant] will have access to a health club membership" because he "enjoys swimming and regularly utilizes the pool at the Fit One Health Club." Claimant's mother has historically requested that the membership include the family because claimant requires supervision.

36. As noted in Factual Finding 9, claimant was notified by letter dated October 20, 2009, that this service was going to be suspended and FNRC determined that he did not meet the criteria for an exemption. Claimant filed for a Fair Hearing on October 28, 2009, and withdrew that appeal on March 25, 2010.

37. FNRC provided this service through March 2010.

38. In subsequent IPP planning sessions, claimant sought to reinstate this membership.

39. FNRC denied claimant's request to reinstate a family health club membership and issued the NOPA dated October 4, 2010. The reason for the action stated, "changes to the Lanterman Act prevent FNRC from purchasing non-medical therapies such as health club memberships. FNRC has reviewed your request and determined that it does not meet the criteria for an exception." The authority for the action was section 4648.5.

40. Claimant contends that the October 20, 2009 letter informing the family of the budget reductions facing the regional center in light of changes to the Lanterman Act and specifying claimant's affected services was not adequate notice for purposes of suspending this membership. He also asserts that an IPP developed in 2010 provides for this service. Therefore, he submits that he is entitled to this membership with aid paid pending from March 25, 2009, regardless of the fact that a previous Fair Hearing Request on this issue was withdrawn on March 25, 2010.

41. Section 4710 requires adequate notice be sent by certified mail at least thirty days before the regional center makes a decision without the mutual consent of the claimant (or authorized representative) to reduce, terminate, or change services set forth in his IPP. Adequate notice must also be provided when the regional center makes a decision without mutual consent to deny the initiation of a service or support requested for inclusion in the IPP.

"Adequate notice" is defined in section 4701 to mean:

A written notice informing the applicant, recipient, and authorized representative of at least all of the following:

- (a) The action the service agency proposes to take, including a statement of the basic facts upon which the service agency is relying.
- (b) The reason or reasons for that action.
- (c) The effective date of that action.
- (d) The specific law, regulation or policy supporting the action.
- (e) The responsible state agency with whom a state appeal may be filed, including the address of the state agency director.

[¶] . . . [¶]

42. Allen Dickens is an FNRC Service Coordinator who acted in that capacity for claimant for several months during 2009. He testified that on August 12, 2009, he left a message for claimant's parents "asking about scheduling an annual review meeting and to inform them of several NOPAs coming related to recent cuts in Regional Center services per Assembly Bill 9." A meeting was subsequently scheduled for August 21, 2009. Mr. Dickens met with the family on that date and testified that they did not conduct an IPP/Annual Review because "the family was upset about the recent NOPAs...." He also stated that the family requested to videotape the meeting and he was not comfortable with that.

Mr. Dickens testified that when he discussed the changes in claimant's services that would occur due to the AB 9 changes, the parents never told him they were confused or did not understand the proposed changes.

43. Claimant's contention that the October 20, 2009 letter did not provide adequate notice was not persuasive. The letter contained the basic requirements of "adequate notice" as defined by section 4701. The family specifically addressed the "denial of gym membership" and request for "continuation of gym membership" in the October 28, 2009 Fair Hearing Request. In addition, the family is not unfamiliar with the Fair Hearing Process and it can be concluded from the evidence that they would and did seek clarification as needed.

44. Rachel Newkirk became claimant's FNRC Service Coordinator in November, 2009. She testified that the process of scheduling and completing claimant's IPP/Annual Review has been "atypical." She explained that claimant's father, who understandably wanted to be present, works until 4:00. She attempted to hold meetings in the evening and on weekends to accommodate his schedule but, over time, that became difficult with her own work schedule and childcare situation. She stated that the length of time required to complete the latest IPP far exceeded the typical IPP/Annual Review process and required many meetings for close to a year with most meetings lasting between two and six hours each.

45. Ms. Newkirk's ID notes (Interdisciplinary Notes recorded by FNRC personnel) showed numerous entries documenting meetings, attempts to schedule meetings, as well as cancelled and rescheduled meetings from December 14, 2009 through September 29, 2010.

46. During this time, claimant's parent's prepared and provided their own "Annual Review" document to FNRC which stated:

An annual review has not been held and we are having scheduling conflicts. As well [parent's] are so overwhelmed by the lack of support by the Regional Center in dealing with [claimant's] anxiety and behaviors that there is just not enough time to set aside to complete an IPP, Family Plan and Annual Review. So, in order to get it done, [parent's] are writing this and submitting it to Far Northern Regional Center.

47. Ms. Newkirk testified regarding her procedures for drafting claimant's IPPs. She explained that an IPP is her "map of what is going on in someone's life" that is drafted in collaboration with the family. In formulating goals and objectives, she "takes into account what the family wants" and, "even if it is a service that FNRC doesn't provide, she will write the request into the proposed IPP." She testified that she has no authority to approve or disapprove a service and stated, "if you want me to ask for a Ferrari, I will ask for a Ferrari." The way she addresses a request during IPP planning is by including language stating, "SC (Service Coordinator) on behalf of parents will request . . ."

Ms. Newkirk also explained that claimant's mother is actively involved in writing the IPP and provides her input into the language used. Specific portions of the IPP, including the "Family Plan" section and the "Why" sections justifying each objective, "were written with information the family provided during the IPP meetings regarding all of [claimant's] health requirements, other needs, etc. Far Northern Regional Center does not possess current documentation in his file from health, educational or other agencies to either support or deny the family's needs and [claimant's] health requirement as they have been stated in these sections." She and several other FNRC staff testified that it is "common knowledge at FNRC that the [parents] have refused to sign releases of information for FNRC to obtain records or speak to his medical, school and other care providers directly for years."

48. Claimant's mother testified that she maintains binders of claimant's records in her home that FNRC may have access to. She stated that the parent's "do not feel it is appropriate to sign global releases of information. They are more than happy to provide FNRC with specific information that they may request when FNRC demonstrates a need relevant to the information requested."

Ms. Newkirk explained that the binders appeared to contain extensive amounts of information and that she was not allowed to take any of the information with her. She opined that "any benefit from such a time-consuming experience would be limited to the small amount of information I could commit to memory and thus pointless."

49. Based on the foregoing, an IPP was essentially completed, though in dispute, on September 30, 2010. Larry Withers, FNRC Case Management Supervisor, was present at this meeting and informed the parents that NOPAs would be forthcoming because “services requested in the IPP were either against new legislation, went beyond the scope of regional center responsibilities or conflicted with Title 17, the Lanterman Act and FNRC POS guidelines.”

Ms. Newkirk discussed changes/additions to this IPP with claimant’s mother by telephone on October 1, 2010, which she then incorporated into the document.

50. The parents contend that this IPP provides for a family health club membership to meet one of claimant’s objectives with a plan that states “SC (Service Coordinator) on behalf of parents will request that FNRC will fund a family health club membership at Fit One Health Club for the term of his IPP. Regarding the above request, if a prior authorization existed for FNRC funding for this request, parents contend there should never have been a break in the authorization of this service.”

51. The IPP process for claimant involved documenting all services provided and requested. FNRC then denied several services and issued the corresponding NOPAs. There was no evidence that agreement was reached to provide a family health club membership.

52. Section 4648.5, subdivision (a), suspends regional centers’ authority to purchase the following services: (1) camping services and associated travel expenses; (2) social recreation activities, except for those activities vendored as community-based day programs; (3) educational services for children three to 17, inclusive, years of age; and (4) nonmedical therapies, including, but not limited to, specialized recreation, art, dance, and music. This suspension of purchase authority is to remain in effect pending implementation of the Individual Choice Budget (ICB), with the expectation that the ICB “will result in state budget savings sufficient to offset the costs of providing” these services. For existing consumers currently receiving such services, the law took effect on August 1, 2009.

FNRC may only purchase these services when a consumer meets the exemption criteria set forth in section 4648.5, subdivision (c) that provides:

An exemption may be granted on an individual basis in extraordinary circumstances to permit purchase of a service identified in subdivision (a) when the regional center determines that the service is a primary or critical means for ameliorating the physical, cognitive, or psychosocial effects of the consumer’s developmental disability, or the service is necessary to enable the consumer to remain in his or her home and no alternative service is available to meet the consumer’s needs.

53. Claimant's parent's testified that a health club membership is necessary for developing claimant's social skills and self esteem. The activity is also calming to him and helps him sleep at night. Claimant requires routine and has enjoyed the health club for several years. His mother also explained that using the public pool is not appropriate because the environment is too chaotic for claimant.

54. Lisa Benaron, M.D., FNRC's Medical Director, testified that a health club membership, while healthy and beneficial for many individuals, is not a recognized treatment or intervention for autism. She noted that claimant's aide takes him on community outings and he has other opportunities to exercise, swim or socialize. She explained that this family membership would not be a cost-effective use of public funds and that typically developing children who live at home are often included in the family gym membership. Dr. Benaron opined that this service is not a primary or critical means of ameliorating the physical, cognitive, or psychosocial effects of claimant's disability.

55. Larry Withers testified that during the passage of AB 9 he worked with FNRC's Associate Director of Case Management Services, Cynthia Madison, to establish exception criteria for suspended services that would be used in reviewing each consumer who would be impacted by section 4648.5. The regional center had the responsibility to identify services for suspension and to develop and apply the criteria for determining consumer exemptions. This process involved reviewing the services of approximately 6,000 consumers.

When FNRC looked at claimant's health club membership, it was determined that it was not a critical or primary service to address the effects of his developmental disability. His daily in-home behavior program and his school program were both considered more critical in addressing his developmental needs.

56. While claimant may have benefited from his health club membership, it was not established that this service is a primary or critical means for ameliorating the physical, cognitive, or psychosocial effects of his developmental disability. There was no evidence presented that this service was other than a non-medical therapy and/or specialized recreation or socialization program. There was no evidence to support a finding that claimant would be unable to remain in his home absent a health club membership.

57. A determination of aid paid pending is not applicable because claimant was not receiving the service at the time the NOPA related to this issue was issued. The service was terminated in March 2010, after claimant dismissed a previous Fair Hearing Request related to this service.

Round Trip Transportation to Claimant's Part-Time Job in Chico

58. FNRC denied claimant's "request to fund round trip transportation for [claimant] to and from his home in Paradise to his part-time job in Chico" and issued the NOPA dated October 4, 2010. The reason for the action stated, "funding of work transportation for a teen-aged child is considered a parental responsibility. FNRC cannot provide transportation for a

minor child unless the family provides sufficient documentation that they are unable to provide transportation. The authority for the action was sections 4646.4, subdivision (a)(4); 4648.35, subdivision (d); Far Northern Regional Center Purchase of Service Funding Policy; and POS Guidelines for Transportation.

59. The parents contend that the September 30, 2010 IPP, discussed above, provides for travel reimbursement to claimant's part-time job to meet one of claimant's objectives with a plan that states "SC (Service Coordinator) on behalf of parents will request that FNRC will fund travel reimbursement to and from the Butte County Library in Chico, CA up to 32 miles per day."

Ms. Newkirk included all parent requests in the IPP in this manner and the request was denied.

60. Section 4646.4, subdivision (a)(4), provides:

Effective September 1, 2008, regional centers shall ensure, at the time of development, scheduled review, or modification of a consumer's individual program plan developed pursuant to Sections 4646 and 4646.5, or of an individualized family service plan pursuant to Section 95020 of the Government Code, the establishment of an internal process. This internal process shall ensure adherence with federal and state law and regulation, and when purchasing services and supports, shall ensure all of the following:

(4) Consideration of the family's responsibility for providing similar services and supports for a minor child without disabilities in identifying the consumer's service and support needs as provided in the least restrictive and most appropriate setting. In this determination, regional centers shall take into account the consumer's need for extraordinary care, services, supports and supervision, and the need for timely access to this care.

Section 4648.35(d) provides:

Effective July, 1, 2009, at the time of development, review, or modification of a consumer's individual program plan (IPP) or individualized family service plan (IFSP), all of the following shall apply to the regional center:

(d) A regional center shall fund transportation services for a minor child living in the family residence, only if the family of the child provides sufficient written documentation to the regional center to demonstrate that it is unable to provide transportation to the child.

61. FNRC has not previously funded transportation to claimant's part-time volunteer job at the Chico library.

62. Larry Withers, Case Management Supervisor, testified that after passage of AB 9 the regional center has a list of factors ("decision tree") to be considered in determining whether a family is unable to provide transportation. These factors include the reason for the travel, economic hardship of the family, lack of access to a vehicle and the detriment to the claimant if they were unable to receive the service. Typically transportation is provided when a family does not have access to a vehicle and is on public assistance.

63. Claimant's parents provided information to FNRC stating that they were having financial difficulties, which they allege are primarily related to FNRC's failure to pay the costs for claimant's home program (Project Christian), which they are contesting. The parents have been paying those costs and testified that as a result they may be in danger of losing their home. However, the family owns vehicles and claimant's father is employed as a teacher. They are not on public assistance.

64. FNRC also suggested that a part-time job closer to claimant's home should be considered if transportation is a concern and that it is generally a parent's responsibility to provide transportation for a child who wants a part-time job but can not drive. Claimant worked at the Paradise library in the past but did not like it as much as the Chico library.

65. Mr. Withers also noted that claimant reached the age of eighteen during the pendency of this hearing. Claimant's parents would not have the same responsibility for providing transportation at that point. However, he testified that the 2011 enactment of section 4648.55, subdivision (a) (A.B.104, Chapter 37, Statutes of 2011) would then prevent FNRC from funding this service for claimant.

Section 4648.55, subdivision (a), provides:

(a) A regional center shall not purchase day program, vocational education, work services, independent living program, or mobility training and related transportation services for a consumer who is 18 to 22 years of age, inclusive, if that consumer is eligible for special education and related education services and has not received a diploma or certificate of completion, unless the individual program plan (IPP) planning team determines that the consumer's needs cannot be met in the educational system or grants an exemption pursuant to subdivision (d). If the planning team determines that generic services can meet the consumer's day, vocational education, work services, independent living, or mobility training and related transportation needs, the regional center shall assist the consumer in accessing those services. To ensure that consumers receive appropriate educational services and an effective transition from services provided by educational

agencies to services provided by regional centers, the regional center service coordinator, at the request of the consumer or, where appropriate, the consumer's parent, legal guardian, or conservator, may attend the individualized education program (IEP) planning team meeting.

Subdivision (d) provides:

An exemption to the provisions of this section may be granted on an individual basis in extraordinary circumstances to permit purchase of a service identified in subdivision (a). An exemption shall be granted through the IPP process and shall be based on a determination that the generic service is not appropriate to meet the consumer's need. The consumer shall be informed of the exemption and the process for obtaining an exemption.

66. The family did not establish that they were unable to transport claimant to his part-time volunteer job. Their financial difficulties were not shown to be at the level requiring FNRC funding and this service would typically be a parental responsibility.

67. Claimant's service needs as an adult will be appropriately addressed upon completion of the assessments noted in Factual Finding 19. If it is determined that transportation to a part-time job is a necessary service, section 4648.55 requires that service be pursued through the educational system. Claimant's service coordinator may be requested to attend his IEP planning team meeting for this purpose.

Reimbursement of Travel Expenses To and From School, Up To Thirty-Two Miles Per Day

68. FNRC denied claimant's "request for travel reimbursement of travel expenses to and from school, up to 32 miles per day at the IRS rate" and issued the NOPA dated October 4, 2010. The reason for the action stated, "the requested transportation service is the responsibility of the local education agency and FNRC is precluded from funding any educational services. FNRC is also precluded from funding transportation for minor children unless the family provides FNRC with written documentation that they are unable to provide said transportation and that would result in the consumer not receiving important services or supports." The authority for the action was sections 4659, subdivision (a)(1); 4648, subdivision (a)(8); 4648.35, subdivision (d); and 4648.5.

69. Section 4659, subdivision (a)(1), provides:

(a) Except as otherwise provided in subdivision (b) or (c), the regional center shall identify and pursue all possible sources of funding for consumers receiving regional center services. These sources shall include, but not be limited to, both of the following:

(1) Governmental or other entities or programs required to provide or pay the cost of providing services, including Medi-Cal, Medicare, the Civilian Health and Medical Program for Uniform Services, school districts, and federal supplemental security income and the state supplementary program.

Section 4648, subdivision (a)(8), specifies:

In order to achieve the stated objectives of the consumer's individual program plan, the regional center shall conduct activities including, but not limited to, all of the following:

(a) Securing needed services and supports.

(8) Regional center funds shall not be used to supplant the budget of any agency which has a legal responsibility to serve all members of the general public and is receiving public funds for providing those services.

70. Section 4648.35, subdivision (d), as set forth in Factual Finding 60 above, precludes the regional center from funding transportation services for a minor child living in the family residence, unless the family of the child provides sufficient written documentation to the regional center to demonstrate that it is unable to provide transportation to the child.

71. Section 4648.5, as set forth in Factual Finding 52 above, suspends regional centers' authority to purchase educational services for children three to 17, inclusive, years of age. FNRC may only purchase these services when a consumer meets the exemption criteria set forth in section 4648.5, subdivision (c).

72. Claimant's March 25, 2009 IPP contains an "Addendum to Objective #3" which explains:

[Claimant] attends Chico Country Day School and transportation to and from school is not addressed in his IEP (Individualized Education Program). Laura Larson, FNRC Executive Director has agreed to reimburse transportation expenses up to 32 miles per day through the end of the current school year and during the summer session.

The "Plan" provides:

FNRC will fund travel reimbursement to and from school up to 32 miles per day at .25 per mile, with Sarah Reynolds, member of [claimant's] behavioral team, from 3/25/09 through 8/31/09.

73. Claimant began attending a new school, Chico Unified School District's (CUSD) Inspire Charter High School, at the beginning of the 2010-2011 academic year. Butte County SELPA IEP Team Meeting Notes dated September 9, 2010, state, "parent requested the district pay for mileage to and from school; the district declines the parents' request to fund this service because it is parents' choice to attend Inspire Charter High School."

74. Claimant's parents contend that because FNRC agreed to fund transportation to and from school in the past that it should do so at this time.

75. The family did not establish that they were unable to transport claimant.

76. In addition, there was no evidence presented to demonstrate that CUSD is unable to provide a Free Appropriate Public Education (FAPE) to claimant that would include transportation services. The denial to fund transportation costs was based on parents' choice of Inspire Charter High School for their son. There was no evidence presented that claimant contested CUSD's denial of funding claimant's transportation costs.

The local education agency is responsible for providing educational and related services to claimant. Claimant did not demonstrate that he has exhausted this resource. Claimant's service coordinator may be requested to attend his IEP planning team meeting to offer assistance.

Transportation and Travel Expenses, and Registration Fees for up to Five Persons to Attend the Annual DAN (Defeat Autism Now) Conference

77. FNRC denied claimant's "request for funding of travel expenses and registration for five (5) persons to attend the annual Defeat Autism Now (DAN) conference. This request includes registration fees, rental car, airfare, parking/tolls and mileage reimbursement from Paradise to Chico at the IRS rate." The NOPA was issued October 4, 2010. The reason for the action stated, "Changes to the Lanterman Act limit FNRC's ability to fund transportation services for minor children unless the family submits documentation showing that they are unable to provide transportation and that the consumer will not receive important services or care. The request for five persons to attend this conference is excessive and not a cost-effective use of public resources." The authority for the action was sections 4646, subdivision (a); 4648.35, subdivision (d); and FNRC Purchase of Service Funding Policy.

Section 4646, subdivision (a), provides:

It is the intent of the Legislature to ensure that the individual program plan and provision of services and supports by the regional center system is centered on the individual and the family of the individual with developmental disabilities and takes into account the needs and preferences of the individual and family, where appropriate, as well as promoting community integration, independent, productive, and normal lives, and stable and healthy

environments. It is the further intent of the legislature to ensure that the provision of services to consumers and their families be effective in meeting the goals stated in the individual program plan, reflect the preferences and choices of the consumer, and reflect the cost-effective use of public resources.

78. FNRC also determined, as set forth in Factual Finding 60 above, that section 4648.35, subdivision (d), prohibited funding transportation for claimant while he was a minor living in the family home

79. Claimant's March 25, 2009, IPP states that "[claimant's] family will attend one conference per year that is sponsored by Defeat Autism Now (DAN) within California." The reason stated was "because [claimant's] parents have expressed an interest to attend a yearly DAN sponsored conference." The plan stated:

FNRC will reimburse family for registration fee, lodging, mileage and per diem expenses associated with a yearly DAN conference in California.

Parents will notify SC (Service Coordinator) or CMS (Case Management Supervisor) of the conference they wish to attend in order to authorize appropriate registration, lodging, mileage and per diem arrangements.

80. Claimant's mother sought to add "rental car, airfare, and up to 2 staff members" to this plan.

81. There was disagreement as to whether this service was agreed upon during the 2009-2010 IPP process. Claimant has not sought funding for this conference since the NOPA was issued on October 4, 2010, but is seeking aid paid pending in the event that a conference becomes available during the pendency of this hearing. There was no evidence presented that a conference sponsored by DAN within California was scheduled during that time period.

82. At this time, claimant is no longer a minor living in the family home thus the prohibition of section 4648.35, subdivision (d), would not apply. The relevant issue is whether the cost of funding this conference is excessive and not a cost-effective use of public funds.

83. Claimant's family contends that the Lanterman Act provides for parent training to enable them to maintain their child at home and address his needs and that attendance at a DAN conference gives the family access to important information regarding claimant's needs related to autism, which helps them respond to those needs appropriately. While they do extensive internet research regarding autism, those activities cannot provide the training of participatory activities. They allege that they live in an area without access to conference training and because FNRC has not provided an option, it should fund the costs for family attendance at one annual autism conference.

84. The parents also contend that the September 30, 2010 IPP, discussed above, provides for funding these costs based on an objective stating “[claimant’s] family and/or members of [claimant’s] staff will attend one conference per year that is sponsored by Defeat Autism Now (DAN), or one of any other autism related conference per year” because “[claimant’s] parents request that their family and/or members of [claimant’s] staff attend one DAN conference per year to keep abreast on all the latest information about autism and the protocol that they follow.

The accompanying plan states “SC (Service Coordinator) on behalf of parents will request that FNRC fund one DAN, or one of any other autism related conferences per year...”

85. The IPP process for claimant involved documenting all services provided and requested. FNRC then denied several services and issued the corresponding NOPAs. There was no evidence that agreement was reached to provide transportation and travel expenses, and registration fees for up to five persons to attend the annual DAN conference.

86. Mr. Withers testified that it is highly unusual for FNRC to fund consumer’s transportation costs to conferences and it does not typically pay for registration fees. It provides Rowell Family Empowerment with grants to pay tuition for informative programs for consumers and families which have been affected by the recent budget cuts.

87. Dr. Benaron testified that in determining whether a service is a cost-effective use of public funds, the regional center considers the benefits of the service to justify the cost. She was adamant about the fact that “no cost would justify this service as there is no benefit to attending DAN (or ARI) conferences.” She opined that none of the DAN treatment regimens have sufficient proof of effectiveness, are experimental and are “beyond unacceptable.” She stated that there was “zero benefit” in terms of remediating any problem experienced by a child with autism. She also expressed that a request for up to five people was excessive and that if the parent’s desire to use recommended interventions, they can be ordered by claimant’s DAN doctors or claimant’s parents themselves. She concluded that this service is neither primary nor critical to ameliorate the effects of claimant’s disability.

88. A preponderance of the evidence established that this service was not required to alleviate claimant’s developmental disability, assist his habilitation or rehabilitation, or achieve and maintain an independent productive and normal life, and it is not a cost-effective use of public funds.

Transportation and Travel Expenses from Paradise to Reno, Nevada, up to Twelve Times Per Year to See Dr. Meier.

89. Dr. Richard Meier is an optometrist who has provided vision therapy to claimant since approximately 1999. His services were addressed in the July 17, 2009, Kopec Decision. Judge Kopec found that Dr. Meier prescribed vision therapy for the following conditions; esotropia (one eye turned inward); accommodative dysfunction (inability to focus, sustain focus, and change focus from near to far); ocular motor dysfunction (inability for the eyes to

track); and perceptual deficits (problems with visual memory, spatial orientation, and processing visual information).

90. Judge Kopec found that “some of the benefits of vision therapy, such as the improvement of claimant’s nearsightedness and improvement of eye-hand and eye-body coordination, are universally beneficial. Almost anyone needing eyeglasses could benefit from some of the therapies that Dr. Meier provided claimant. But others, such as improving visual memory and visual tracking skills, are more clearly associated to conditions associated with persons with developmental disabilities, such as autism or cognitive disabilities, and are a substantial portion of the visual therapy provided to claimant. Regional Center has failed to show that Dr. Meier’s vision therapy does not alleviate claimant’s developmental disability, assist his habilitation or rehabilitation, or achieve and maintain an independent, productive, and normal life.”

91. Dr. Meier acknowledged that professional literature is inconclusive about whether deficits like claimant’s are a result of autism, and FNRC suggested that similar benefits may be achieved through the services of a learning or reading specialist. However, it was not established that the planning team had considered any other options, nor had the regional center established that vision therapy is not effective in meeting claimant’s goals, or that it is not cost-effective. Judge Kopec concluded that “since vision therapy is a service that can be provided, claimant is eligible for necessary transportation to receive it”.

Judge Kopec ordered “regional center shall fund travel expenses for appointments with Dr. Meier⁴ as included in the last agreed-upon IPP that authorized such travel.”

92. As set forth in Factual Finding 9 above, the October 20, 2009 letter informed claimant that travel would be terminated pursuant to the statutory amendments to the Lanterman Act enacted under AB 9. On October 28, 2010, claimant filed a Fair Hearing Request seeking “Reinstatement of travel reimbursement to Dr. Meier as ordered (w/ aid paid pending).” That appeal was withdrawn on March 25, 2010.

93. FNRC provided this service through March 2010.

94. Claimant contends that the October 20, 2009 letter informing the family of the budget reductions facing the regional center in light of changes to the Lanterman Act and specifying claimant’s affected services was not adequate notice for purposes of suspending this service. Therefore, he submits that he is entitled to this service with aid paid pending from the date of Judge Kopec’s decision, regardless of the fact that a previous Fair Hearing Request on this issue was withdrawn on March 25, 2010.

⁴ Throughout the various documents submitted in this matter, Dr. Meier’s name has been misspelled. The corrected spelling has been used in any references to Dr. Meier in this decision.

95. Claimant's contention that October 20, 2009 letter did not provide adequate notice was not persuasive. The letter contained the basic requirements of "adequate notice" as defined by section 4701.⁵ The family specifically addressed the "termination of travel reimbursement to Dr. Meier as ordered by ALJ Judith Kopec..." and sought "reinstatement of travel reimbursement to Dr. Meier as ordered (w/ aid paid pending)" in the October 28, 2009 Fair Hearing Request. In addition, the family is not unfamiliar with the Fair Hearing Process and it can be concluded from the evidence that they would and did seek clarification as needed.

96. In subsequent IPP planning sessions, claimant sought to reinstate this service. He asserts that the IPP developed in 2010 provides for this service by stating, "SC on behalf of parents will request that FNRC fund twelve (12) round trips per fiscal year between Paradise and Reno, NV to see Dr. Meier. This will include 365 miles round trip at current IRS rate along with per diem reimbursement for meals and lodging (up to two separate hotel rooms or one hotel suite with bedrooms) at the high cost rate which is currently \$199.00 per night with the ability to combine that rate to include a suite where applicable; not to exceed \$398.00 per night..."

97. The IPP process for claimant involved documenting all services provided and requested. FNRC then denied several services and issued the corresponding NOPAs. There was no evidence that agreement was reached to provide transportation to appointments with Dr. Meier.

98. FNRC denied claimant's "request for the funding of transportation from Paradise to Reno, NV, up to 12 times per year to see Dr. Meier. This request includes 365 miles at the IRS rate, along with meals and expenses for four persons and two hotel rooms (or suite)." The NOPA issued October 4, 2010. The reason for the action stated, "(1) Documentation provided to FNRC does not show that you are unable to provide transportation for [claimant] to this appointment. Changes to the Lanterman Act effective July 2009 prohibit regional centers from funding transportation of a minor child without sufficient documentation from the family of their inability to provide transportation. (2) The service as requested is not cost-effective use of public resources and a medical provider closer to the family home should be explored. The authority for the action was sections 4648.35, subdivision (d), and 4646, subdivision (a).

99. Judge McLean, in the Butte County Writ proceeding, addressed this issue as follows:

Item 2 of said (Kopec) ORDER states that "Regional center shall fund travel expenses for appointments with Dr. Meier as included in the last agreed-upon IPP that authorized such travel."

As to this item, the petition is granted, with Respondent to fund such expenses from the date of said IPP through the Fair Hearing Requests of October 28, 2009, if they have not already done so.

⁵ See Factual Findings 41 through 43.

Any other orders or determinations with regard to said item are to be made in the Fair Hearing Process.

100. Section 4648.35, subdivision (d), as set forth in Factual Finding 60 above, precludes the regional center from funding transportation services for a minor child living in the family residence, unless the family of the child provides sufficient written documentation to the regional center to demonstrate that it is unable to provide transportation to the child.

The family did not establish that they were unable to transport claimant to his appointments with Dr. Meier and this service would typically be a parental responsibility.

101. Section 4646, subdivision (a), requires that the provision of services to consumers and their families be effective in meeting the goals stated in the individual program plan, reflect the preferences and choices of the consumer, and reflect the cost-effective use of public resources.

Now that claimant is an adult consumer, cost effectiveness is still relevant even though the requirements for transportation services change.

102. Dr. Meier testified that he last saw claimant in November 2010 and was providing vision therapy for his convergence insufficiency, ocular-motor dysfunction and esophoria. He testified persuasively that this vision therapy itself is not experimental and “every optometrist in the state of California or actually every optometrist in the United States has to pass a test in visual therapy in order to practice optometry.” However, he stated that while these conditions can be present in individuals with autism, he had no knowledge as to whether these conditions were caused by autism. These conditions are also commonly present in individuals without autism.

103. Dr. Meier explained that an individual needs to receive vision therapy on an ongoing basis in order to achieve benefit. Claimant normally has his re-evaluation in the summer and Dr. Meier stated that he “needs re-evaluation to see his visual system status.” He acknowledged that there is a “ceiling effect” where an individual cannot get past a certain level of visual improvement. He was unable to project how long claimant’s visual therapy would take and stated that he “needs to re-evaluate” and he “can give a better prognosis.”

104. Dr. Benaron testified that vision therapy is not a proven therapy for remediation of problems of autism. Her opinion is that the diagnoses cited by Dr. Meier are found in 53 percent of typically developing children and no scientific study has linked these types of diagnoses to autism.

105. There was no evidence presented that claimant could not obtain vision therapy in a more cost-effective manner, such as from a local optometrist, since according to Dr. Meier, all optometrists are trained in this therapy.

106. At this time, claimant's vision therapy needs could not be determined because Dr. Meier stated that he needs to be re-assessed. While adult transportation to medical appointments may be considered, it would not be a cost-effective use of public funds, at this time, for FNRC to fund the requested transportation and travel expenses absent a determination of current needs and availability of additional, potentially more cost-effective, resources.

Legal services for an educational attorney

107. FNRC denied claimant's "request for funding of an educational attorney" and issued the NOPA dated October 4, 2010. The reason for the action stated, "(1) This requested [sic] was already denied by Administrative Law Judge Judith Kopec in July of 2009. (2) There are community resources available for educational advocacy. (3) Changes to the Lanterman Act prohibit regional centers from funding educationally related services. (4) The requested services are not needed to alleviate [claimant's] developmental disability, assist his habilitation or rehabilitation, or achieve and maintain an independent and productive life." The authority for the action was sections 4659, subdivision (a)(1) and (2); 4646, subdivision (a); and 4648.5.

Sections 4659(a)(1) and (2) require FNRC to identify and pursue all sources of funding for consumers receiving their services, and section 4646(a) requires that the provision of services to consumers and their families be effective in meeting the goals stated in the individual program plan, reflect the preferences and choices of the consumer, and reflect the cost-effective use of public resources.

Section 4648.5 suspends the regional centers authority to purchase educational services for children three to 17, inclusive years of age, as a result of AB 9.

108. Judge Kopec addressed this issue in her July 17, 2009, decision. She found that, in the few years prior to that hearing, FNRC had funded legal services for special education advocacy totaling over \$40,000, with the most recent authorization expiring at the end of June 2008. It was undisputed that claimant had been involved in a number of disputes with local education agencies responsible for providing his special education services. At that time, Judge Kopec concluded that "claimant has not established that the requested legal services are needed to alleviate his developmental disability, assist his habilitation or rehabilitation, or achieve and maintain an independent, productive and normal life."

109. Claimant's October 15, 2010, Fair Hearing Request sought additional funding for an educational attorney. At hearing, claimant's mother testified that there were no current disputes with any school districts that required legal assistance.

When questioned by claimant's counsel, claimant's mother responded that, in addition to requesting funding for an educational attorney for possible future school issues, she would like funding for legal assistance with regional center Fair Hearings, including this matter, and with their civil suit against the regional center.

110. Larry Withers testified that he was not informed of any specific, current disputes claimant was having with his school district. He also stated that it is very unusual for FNRC to fund attorneys' fees as there are many resources available for this service including Clients Rights Advocacy, Disability Rights California, Area II Developmental Disabilities Board and private resources. Generic resources should be considered first, including family responsibility. He also noted that John Hollister, a former FNRC Clients' Rights Advocate has worked, and continues to work, extensively for the family.

111. Claimant's October 1, 2010, IPP request for legal services states:

[Claimant] will receive legal services in order to facilitate appropriate placement among his mainstreamed peers in the least restrictive environment. Parents currently fund private legal services and state here and previously that they have provided FNRC with letters from various generic legal advocacy advisors stating they are unable to represent this family due to the complex nature of the issues.

SC will request that FNRC fund legal services through an educational attorney to advocate for [claimant] on his behalf as it relates to his educational needs. If needed this attorney will advocate at fair hearings and in court related arenas. Regarding the above request, if prior authorization existed for FNRC funding for this request, parents contend there should never have been a break in the authorization of this service.

112. It was clear that claimant's Fair Hearing request sought funding for legal services to address his "educational needs" and to "advocate for his educational rights through the school district." This was expanded at hearing to request representation in Fair Hearings and litigation with the regional center.

113. FNRC's argument was persuasive that while section 4512 provides for "advocacy assistance" as an available service and support for persons with developmental disabilities, that does not imply a broad obligation to fund litigation for all of their consumers. It was established that there are no current disputes with educational agencies requiring legal assistance.

629 Hours per Month of Aid Paid Pending for Claimant's "Parent-Vendored Home Program" from July 17, 2009

114. In approximately 2004, claimant's father became vendored to provide an in-home program for claimant, "Project Christian." The purpose of this vendorization was to allow the family to obtain and have control over a home program. The home program was vendorized under the FNRC day care service code because a more appropriate code did not

exist and it was the only way for claimant's family to have the program they desired. Regional centers are required to utilize a vendor code to allow authorization for funding of services.

115. Over the years, FNRC became concerned about the amount of money that flowed through Project Christian and the accompanying burden on the family. They were also aware of an investigation into the family's use of some of the provided funds. The family hired staff, were responsible for all the employment-related record keeping, and funds were reimbursed to claimant's father as the vendor.

116. A decision was made to discontinue the services funded under the day care code because FNRC stated that it had located a behavioral services vendor to assess claimant, develop a level of service to meet his needs, and supply the necessary staff. This issue proceeded to Fair Hearing and was determined in the Kopec Decision.

117. Judge Kopec found that under claimant's 2007 IPP, as amended in March 2008, FNRC funded the parent-vouchered day care program to "provide a clinical team to implement claimant's individually prescribed program." FNRC "funded up to 629 hours a month at \$20 an hour, for a total of \$12,580 a month for his home program, and an aide and dog handler at school." The Kopec Decision further stated:

Claimant's June 2007 IPP acknowledged that he required supervision throughout the day and night. This was met by up to 283 hours a month of in-home supportive services (IHSS) through Butte County. Mother was the IHSS provider. In September 2007, regional center increased the available hours for Project Christian, from 500 hours to 629 hours a month, to fund the cost of Mother attending School as claimant's dog handler. When this happened, Mother was no longer eligible to be an IHSS provider, and claimant no longer received IHSS services. When claimant enrolled in the charter school, Mother no longer served as a dog handler. Instead, these hours were used to fund one of claimant's home tutors to serve as a classroom aide.

118. Judge Kopec found that "an independent agency qualified to take over claimant's services was not selected or available at the time of the notice of proposed action." She also noted that FNRC was discussing the option of replacing Project Christian with an agency capable of providing his needed services. They had been working with one agency, Remi Vista, to develop unique programs for consumers with autism, including a program for adolescents. "While Mother was involved in discussions concerning the option of using Remi Vista, she never agreed to discontinuing claimant's home program and replacing it with a program from Remi Vista, or another service agency."

Judge Kopec concluded, “Regional center is required to fund the services to which claimant is entitled under the Lanterman Act. If those services cannot be funded through the use of the day care service code, regional center is required to provide another service code, or some other mechanism by which it may continue to fund claimant’s required services.”

119. The parties are in disagreement as to exactly what constitutes “Project Christian” but agree that it “consists of many things.” The breakdown of specific service hours was not at issue in the Kopec Decision and only became a direct concern in light of the passage of AB 9. Judge McLean, noting the ambiguity, remanded to FNRC to “make a determination in regard to the number of hours of any behavioral care as opposed to day care...”

120. FNRC contends that Project Christian is an in-home behavior program. With the subsequent passage of AB9, the regional center determined that it is prohibited from funding more than forty hours per week, (173 hours per month), for the in-home program pursuant to enactment of Welfare and Institutions Code section 4686.2.

Section 4686.2 provides:

(a) Effective July 1, 2009, notwithstanding any other provision of law or regulation to the contrary, any vendor who provides applied behavioral analysis (ABA) services, or intensive behavior intervention services or both, as defined in subdivision (d) shall:

(1) Conduct a behavioral assessment of each consumer to whom the vendor provides these services.

(2) Design an intervention plan that shall include the service type, number of hours of parent participation needed to achieve the consumer’s goals and objectives, as set forth in the consumer’s individual program plan (IPP) or individualized family service plan (IFSP). The intervention plan shall set forth the frequency at which the consumer’s progress shall be evaluated and reported.

(3) Provide a copy of the intervention plan to the regional center for review and consideration by the planning team members.

(b) Effective July 1, 2009, notwithstanding any other provision of law or regulation to the contrary, regional centers shall:

(1) Only purchase ABA services or intensive behavioral intervention services that reflect evidence-based practices, promote positive social behaviors, and ameliorate behaviors that interfere with learning and social interactions.

(2) Only purchase ABA or intensive behavioral intervention services when the parent or parents of minor consumer's receiving services participate in the intervention plan for the consumers, given the critical nature of parent participation to the success of the intervention plan.

(3) Not purchase either ABA or intensive behavioral intervention services for purposes of providing respite, day care, or school services.

(4) Discontinue purchasing ABA or intensive behavioral intervention services for a consumer when the consumer's treatment goal and objectives, as described under subdivision (a), are achieved. ABA or intensive behavioral intervention services shall not be discontinued until the goals and objectives are reviewed and updated as required in paragraph (5) and shall be discontinued only if those updated treatment goals and objectives do not require ABA or intensive behavioral intervention services.

(5) For each consumer, evaluate the vendor's intervention plan and number of service hours for ABA or intensive behavioral intervention no less than every six months, consistent with evidence-based practices. If necessary, the intervention plan's treatment goals and objectives shall be updated and revised.

(6) Not reimburse a parent for participating in a behavioral services treatment program.

(c) For consumers receiving ABA or behavioral intervention services on July 1, 2009, as part of their IPP or IFSP, subdivision (b) shall apply on August 1, 2009.

(d) For purposes of this section the following definitions shall apply:

(1) "Applied behavioral analysis" means the design, implementation and evaluation of systematic instructional and environment modifications to promote positive social behaviors and reduce or ameliorate behaviors which interfere with learning and social interaction.

(2) "Intensive behavioral intervention" means any form of applied behavioral analysis that is comprehensive, designed to address all domains of functioning, and provided in multiple settings for no more than 40 hours per week, across all settings,

depending on the individual's needs and progress. Interventions can be delivered in a one-to-one ratio or in small group format, as appropriate.

(3) "Evidenced-based practice" means a decision making process that integrates the best available scientifically rigorous research, clinical expertise, and individual's characteristics. Evidence-based practice is an approach to treatment rather than a specific treatment. Evidenced-based practice promotes the collection, interpretation, integration, and continuous evaluation of valid, important, and applicable, individual-or family-reported, clinically-observed, and research-supported evidence. The best available evidence, matched to consumer circumstances and preferences, is applied to ensure the quality of clinical judgments and facilitates the most cost-effective care.

(4) "Parent participation" shall include, but shall not be limited to, the following meanings:

(A) Completion of group instruction on the basics of behavior intervention.

(B) Implementation of intervention strategies, according to the intervention plan.

(C) If needed, collection of data on behavioral strategies and submission of that data to the provider for incorporation into progress reports.

(D) Participation in any needed clinical meetings.

(E) Purchase of suggested behavior modification materials or community involvement if a reward system is used.

121. As noted in Factual Finding 9, claimant was notified by letter dated October 20, 2009, that this service was going to be "modified to come into compliance with the Lanterman Act." Claimant filed for a Fair Hearing on October 28, 2009 seeking "40 hrs. per week of ABA program, 24 hrs. per day – 7 days per week of personal attendant care (with aid paid pending)." The appeal was withdrawn on March 25, 2010.

122. FNRC provided this service through March 2010.

123. Also as noted above, claimant has been continually seeking enforcement of Judge Kopec's July 17, 2009 decision.

124. During the IPP process, FNRC denied claimant's program requests and issued the NOPA dated October 4, 2010 which was appealed on October 15, 2010

125. Judge Lew, in his June 10, 2011 Order After Prehearing Conference, bifurcated the issues involving Project Christian for separate hearing after a new assessment of claimant is performed. The parties have agreed to the terms of the assessment as noted in Finding 19.

126. Claimant contends that the October 20, 2009 letter informing the family of the budget reductions facing the regional center in light of changes to the Lanterman Act and specifying claimant's affected services did not provide adequate notice for purposes of modifying his in-home program (Project Christian). Therefore, he submits that he is entitled to aid paid pending from July 17, 2009 (Kopec Decision), regardless of the fact that a previous Fair Hearing Request on this issue was withdrawn on March 25, 2010. He also contends that Judge Kopec's denial of reconsideration in December 2009 terminated any basis for the October letter to constitute notice that would require claimant to pursue a Fair Hearing.

127. FNRC, whether or not correct, made a determination that they were required to modify claimant's home program based on the statutory mandate of section 4686.2, which was enacted subsequent to Judge Kopec's decision. This is a new action. Claimant was notified along with numerous other consumers affected by the changes, and responded by filing a Fair Hearing Request demonstrating knowledge that modifications to the home program were at issue. This new action does not prevent claimant from continuing to pursue his separate Superior Court action.

Aid paid pending provides for continuation, during *the appeal procedure*, of services that are being provided pursuant to claimant's IPP. FNRC continued to pay for the disputed services until claimant withdrew the appeal on March 25, 2010. At that time, the appeal of the proposed action was no longer pending and FNRC took the proposed action. Claimant's withdrawal "without prejudice" allows for re-filing of an appeal but does not constitute a stay of the proposed action or prevent termination of aid paid pending. To determine otherwise would potentially allow for claimants to receive services indefinitely if they withdraw a Fair Hearing Request and chose never to re-file. That was not the intent of the legislature in enacting this provision.

128. In this hearing, claimant is seeking a determination of his right to aid paid pending. The determination of what is required for claimant's program going forward, and as an adult, will be made in the subsequent hearing after completion of assessments.

129. A determination that claimant is not entitled to aid paid pending beyond March 25, 2010, is not a determination that FNRC's offer of in-home program hours is appropriate or that its interpretation of section 4686.2 is correct. Those issues will be addressed in the future hearing. It also does not prevent claimant from pursuing his Superior Court action.

LEGAL CONCLUSIONS

1. *Burden of Proof:* A party seeking to change a service in a consumer's IPP typically has the burden of demonstrating that the proposed change is correct.⁶ The burden of proof in this matter requires proof by a preponderance of the evidence. (Evid. Code, § 115.)

Request for Reimbursement of CPI Services Provided in October 2009

2. As determined in Factual Findings 20 through 34, claimant is not entitled to reimbursement for the full cost of CPI services provided in October 2009. FNRC is required to fund crisis management training services and may choose to discharge that obligation by reimbursing claimant in an amount equal to the total cost to FNRC of providing this training through PCM, which parents may choose to use to offset their obligation for the CPI training costs.

Request for Funding a Family Health Club Membership

3. As determined in Factual Findings 35 through 57, FNRC has determined that it is prohibited from funding a family health club membership pursuant to the mandate of section 4648.5, and that claimant does not qualify for an exemption. Therefore, Claimant bears the burden of establishing that he is entitled to an exemption under subdivision (c). Claimant has not met that burden.

FNRC is not required to fund a family health club membership.

Request for Funding the Cost of Round Trip Transportation to and from Paradise to Claimant's Part-Time Job in Chico

4. As determined in Factual Findings 58 through 67, claimant's family did not demonstrate that they were unable to transport claimant to his part-time volunteer job. Their financial difficulties were not shown to be at the level requiring FNRC funding and this service would be a typical parental responsibility for a minor child living in the family home, or the education system when claimant is between the age of 18 and 22.

FNRC is not required to fund the cost of transportation to claimant's part-time job in Chico.

5. Claimant's service needs as an adult will be appropriately addressed upon completion of the assessments noted in Factual Finding 19. This decision does not preclude a subsequent determination of need based on those results.

⁶ California Evidence Code section 500 states that "[e]xcept as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting."

Request for Funding Travel Reimbursement of Travel Expenses to and from School, up to Thirty-Two Miles per Day

6. As determined in Factual Findings 68 through 76, the family did not establish that they were unable to transport claimant to and from school while he was a minor in the family home. As an adult consumer, the requirements change; however the local education agency remains responsible for providing educational and related services to claimant. There was no evidence presented that claimant contested CUSD's denial of funding claimant's transportation costs or that a denial was made for an adult student. Therefore claimant has not demonstrated that FNRC is required to fund travel expenses to and from school.

FNRC is not required to fund the cost of transportation to and from school.

Request for Funding Transportation and Travel Expenses, and Registration Fees for Up to Five Persons to Attend the Annual DAN (Defeat Autism Now) Conference

7. As determined in Factual Findings 77 through 88, FNRC established by a preponderance of the evidence that it is not required to fund expenses and fees for up to five persons to attend the annual DAN conference

Request for Funding Transportation and Travel Expenses from Paradise to Reno, Nevada, up to Twelve Times per Year to See Dr. Meier

8. As determined in Factual Findings 89 through 106, FNRC was required to provide funding for transportation and travel expenses to see Dr. Meier per Judge Kopec's July 17, 2009 decision. A subsequent NOPA was issued based on AB 9 statutory changes. Claimant filed a Fair Hearing Request which was subsequently withdrawn on March 25, 2010, and this service was terminated. Therefore, the burden of proof is on Claimant to establish that he is currently entitled to this service. He did not meet this burden.

FNRC is not required, at this time, to fund transportation and travel expenses to see Dr. Meier.

Request for Funding Legal Services for an Educational Attorney

9. As determined in Factual Findings 107 through 113, FNRC established by a preponderance of the evidence that it is not required to fund legal services for an educational attorney.

Request for Funding of 629 Hours per Month of Aid Paid Pending for "Parent-Vendored Home Program" from July 17, 2009

10. As determined in Findings 114 through 129, FNRC is required to fund 629 hours per month of claimant's home program as aid paid pending from July 17, 2009 through and including March 25, 2010, if it has not done so already.

ORDER

The appeal of claimant Christian G. is granted in part and denied in part.

1. FNRC shall fund training services for claimant's family members who provide direct care to him and his home program service providers in effective and appropriate methods to respond to the specific types of aggressive behaviors that claimant exhibits. FNRC may choose to discharge this obligation by reimbursing claimant in an amount equal to the total cost to FNRC of providing this training through PCM, which parents may chose to use to offset their obligation for the CPI training costs.

2. FNRC shall fund 629 hours per month for claimant's "parent-vendored home program" as aid paid pending for services rendered through and including March 25, 2010, if it has not done so already.

3. Determination of claimant's current service needs as an adult consumer shall be made after review of completed assessments that were agreed to by the parties as stated in Factual Finding 19. This decision does not preclude a subsequent determination of need based on those assessment results.

4. After completion of the pending assessments, the parties shall contact the Office of Administrative Hearings to file a Request for Hearing to proceed with the remaining bifurcated issues.

5. All other relief requested by the parties is denied.

DATED: September 29, 2011

SUSAN H. HOLLINGSHEAD
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter. Each party is bound by this decision. An appeal from the decision must be made to a court of competent jurisdiction within 90 days of receipt of the decision. (Welf. & Inst. Code, § 4712.5, subd. (a).)